

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF S&amp;S )</b>	<b>FINDINGS OF FACT;</b>
<b>COMMUNICATIONS/ALTEANA-CELL'S )</b>	<b>CONCLUSIONS OF LAW;</b>
<b>COMPLIANCE WITH COMMISSION ORDER )</b>	<b>NOTICE OF ENTRY OF</b>
) )	<b>ORDER</b>
) )	<b>TC02-166</b>

**NON-CONFIDENTIAL VERSION<sup>1</sup>**

On June 6, 2003, the Public Utilities Commission (Commission) received a Motion for Order to Show Cause and Notice of Hearing (Motion) from Commission Staff. In the Motion, the Commission Staff moved that the Commission issue an Order to Show Cause against S&S Communications/Alterna-Cell (S&S) pursuant to ARSD 20:10:01:45 and a Notice of Hearing pursuant to ARSD 20:10:24:04.03. Staff requested that the Commission consider the following issues at the show cause hearing: 1) whether the Certificate of Authority of S&S should be revoked; 2) whether fines or penalties should be imposed if S&S is found to have acted in violation of the Commission's March 20, 2003 Order and/or the COA Order; 3) whether an Order to Compel should be issued requiring S&S to produce books and records as provided in SDCL 49-31-7.1; and 4) whether other appropriate relief should be granted by the Commission.

On June 11, 2003, the Commission received a Supplement to Motion for Order to Show Cause and Notice of Hearing (Supplemental Motion) from Commission Staff. In the Supplemental Motion, Staff requested that Les Sumption and Matt Swearingen be prohibited from ever possessing any authority to provide any telecommunications services in the state if the Commission revokes S&S' COA. Staff also requested that the Commission permit Staff to take action against any bonds and the letter of credit issued by the Aberdeen Finance Corporation. In addition, Staff requested that the Commission compel S&S to release the 800 numbers of any customers requesting the release so that customers may maintain their 800 numbers when they seek service from another provider.

At its June 13, 2003, ad hoc meeting, the Commission considered the motions. At the meeting, the Commission heard from Commission Staff and Jon Frankel, attorney for S&S. S&S' attorney did not object to the issuance of an Order to Show Cause and Notice of Hearing. Based on the information provided by Staff, the Commission found that sufficient cause existed to issue an Order to Show Cause and Notice of Hearing and ordered S&S and its owners, Les Sumption and Matt Swearingen, to appear before the Commission on June 30, 2003, beginning at 10:00 a.m., in Room 412 of the State Capitol, 500 East Capitol, Pierre, South Dakota, and show cause why one or more of the following remedies or penalties should not be imposed upon S&S and its owners:

1. Whether the Certificate of Authority of S&S should be revoked or suspended if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law, pursuant to SDCL 49-31-3, 20:10:24:04.02, 20:10:24:04.03, and 20:10:24:04.04;

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<sup>1</sup> A significant portion of the hearing was closed due to testimony based on confidential material. Since a number of the Commission's findings are based on confidential material, the Commission has issued a confidential version and a non-confidential version of this order. Pursuant to ARSD 20:10:01:14, the confidential version will be considered to be an appendix to the non-confidential version.

2. Whether fines or penalties should be imposed if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law, pursuant to SDCL 49-31-7.4, 49-31-38, and 49-31-38.1;
3. Whether an Order to Compel should be issued requiring S&S to produce books and records as provided in SDCL 49-31-7.1;
4. Whether S&S should be ordered to release 800 numbers if requested by the customer that has been assigned the 800 number;
5. Whether the Commission should take action against the bonds and letter of credit issued by Aberdeen Finance Corporation;
6. Whether Les Sumption and/or Matt Swearingen should be barred from providing telecommunications services in South Dakota in the future if the Commission determines that they have violated any Commission orders, rules, or state law, pursuant to ARSD 20:10:24:04.02 and 20:10:24:04.04; and
7. Any other appropriate relief that may be granted by the Commission.

The hearing was held as scheduled on June 30, 2003, and was continued until July 2, 2003. At the end of the hearing, the Commission unanimously voted to revoke S&S' certificate of authority, ordered S&S to release any 800 numbers if requested, and decided to take action against any bonds and the letter of credit issued by Aberdeen Finance Corporation. The Commission took the rest of the issues under advisement. At its August 19, 2003, meeting, the Commission considered the remaining issues. The Commission unanimously voted to assess civil fines totaling \$13,400.00 against S&S and its owners, Les Sumption and Matt Swearingen. In addition, the Commission decided that, at this time, it would not issue any orders to compel. Finally, the Commission voted to bar the owners of S&S, Les Sumption and Matt Swearingen, from reapplying for a certificate of authority during their lifetimes, unless otherwise ordered by the Commission.

The transcript of the hearing is divided into four parts. The first day of the hearing, June 30, 2003 is contained in Volume I of the transcript. Volume I is further divided into the open proceeding and the confidential proceeding. Page citations to the open proceeding of Volume I are referred to as "TR1." Page citations to the confidential portion are referred to as "TR1(conf.)." The second day of hearing, July 2, 2003, is contained in Volume II of the transcript. Volume II is also divided into an open proceeding and a confidential proceeding. Page citations to the open proceeding of Volume II are referred to as "TR2." Page citations to the confidential portion are referred to as "TR2(conf)."

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. On July 21, 2000, the Commission, in accordance with SDCL 49-31-3 and ARSD 20:10:24:02, received an application for a certificate of authority from S&S. Exhibit S1. S&S' application was docketed as TC00-114. *Id.* S&S sought authority to provide interstate and intrastate long distance, voice mail services, 800 number services, and calling card services. *Id.* A proposed tariff was filed by S&S. *Id.* At the time of its application, S&S was already providing prepaid services to customers

pursuant to long-term contracts. TR2 at 38. Some of the prepaid telecommunications services were financed by Aberdeen Finance Corporation. TR2 at 47.

2. On December 21, 2000, the Commission issued an Order Granting Certificate of Authority in Docket TC00-114. The order granted S&S a certificate of authority, subject to the following conditions:

- a. Aberdeen Finance Corporation (AFC) and S&S sending a letter to all of S&S' long distance customers for which AFC holds financing agreements informing them of the collateral agreement;
- b. A continuous \$50,000 (at a minimum) surety bond; and
- c. S&S reporting to the Commission the current level of prepaid customers and updating its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement.

Exhibit 1.

3. At the Commission's March 18, 2003, meeting, Staff and S&S jointly recommended that the Commission reconsider the terms and conditions of S&S' certificate of authority and impose a new restriction that S&S not offer any prepaid services (including a prepaid calling card) or require or accept deposits or advance payments without prior approval of the Commission. Exhibit 2. On March 20, 2003, the Commission issued an order amending S&S' certificate of authority by adding these recommended conditions. *Id.* The order further stated that all conditions contained in the original certificate of authority granted in Docket TC00-114 remained in effect and subject to enforcement by the Commission. *Id.*

4. On May 27, 2003, the Commission received from Staff a Motion for Order to Amend Certificate of Authority to Clarify and Add Reporting Requirements. In the Motion, Staff requested that the Commission require S&S to provide in its reports to the Commission on or before June 21 and December 21 of each year, commencing with June 21, 2003, a number of documents, statements, and information. At its June 3, 2003, meeting, the Commission considered Staff's Motion. At the meeting, S&S stated that it did not object to the Commission granting Staff's Motion. The Commission voted to grant the Motion. On June 3, 2003, the Commission issued its order granting the motion and ordered that S&S' Certificate of Authority is amended to include the following requirements:

- a) A list (electronic and hard copy) of all South Dakota pre-paid customers. Each individual customer listing shall include: customer's name; customer's complete mailing address; customer's telephone number; customer's account number; type of contract (tariffed service offering); number of contracts; contract start date; contract expiration date; amount received per contract (including tax); total amount received (including tax); indication if amount was paid in cash or financed through the Aberdeen Finance Corporation or other source; total (original) customer principal amount financed by the Aberdeen Finance Corporation; current customer principal amount owed to the Aberdeen Finance Corporation; a letter signed by an Aberdeen Finance Corporation officer verifying and concurring with the per customer amounts; S&S' unearned revenue - calculated by dividing the total amount received by the term of the contract and multiplying by the remaining term of the contract; customer

principal amount at risk - this amount is the difference between the unearned revenue and the current customer Aberdeen Finance Corporation principal when the Aberdeen Finance Corporation principal is greater than the unearned revenue; and the calculated bond amount - this amount is the sum of the unearned revenue for all non-Aberdeen Finance Corporation financed customers and the customer principal at risk;

b) A bond totaling the sum of the individual customers' calculated bond amounts;

c) A list (electronic and hard copy) of all South Dakota postpaid customers including: customer's name; customer's complete mailing address; customer's telephone number; customer's account number; and type of service (tariffed service offering); and

d) Generally Accepted Accounting Principles (GAAP) compliant financial statements for S&S, including a balance sheet, income statement, and statement of cash flow for the most recent 12 month period.

### Exhibit 3.

5. On June 6, 2003, the Commission received a Motion for Order to Show Cause and Notice of Hearing from Commission Staff. At the meeting, the Commission heard from Commission Staff and Jon Frankel, an attorney for S&S. S&S' attorney did not object to the issuance of an Order to Show Cause and Notice of Hearing. Based on the information provided by Staff, the Commission found that sufficient cause existed to issue an Order to Show Cause and Notice of Hearing. The hearing was held as scheduled beginning on June 30, 2003.

6. At the hearing, Glen Davis, president of Legend Seeds Incorporated, stated that Legend Seeds entered into a four year contract with S&S for telephone services on April 17, 2003. TR1 at 30, 34, 38; Exhibit 6. Legend Seeds prepaid \$11,700.28 and began to receive service the first part of May of 2003. TR1 at 37, 39; Exhibits 6, 6A. Prior to entering into the contract with S&S, Davis was not told by S&S that the Commission had issued an order on March 20, 2003 that prohibited S&S from offering prepaid services. TR1 at 35. Prior to entering into the contract, S&S did not inform Davis that S&S was experiencing any financial problems. *Id.* During the first part of June of 2003, Legend Seeds stopped receiving service from S&S. TR1 at 39. A Legend Seeds employee was told by S&S that S&S was going to file for Chapter 11 bankruptcy. *Id.* Legend Seeds has not received any money back from S&S. TR1 at 40. Legend Seeds receives and makes both interstate and intrastate telephone calls. TR1 at 44-45. S&S' attorney at the hearing, Tom Sannes, stipulated that the telephone services provided by S&S included intrastate telephone services. TR1 at 196.

7. Brandon Peterson, the general manager of Dakota Premium Hay, stated that Dakota Premium Hay entered into a contract with S&S for telephone services on April 29, 2003. TR1 at 55; Exhibit 7. Dakota Premium Hay prepaid \$3,360.00 for six years of service. TR1 at 55; Exhibit 7A. Prior to entering into the contract with S&S, Peterson was not told that the Commission had issued an order on March 20, 2003 that prohibited S&S from offering prepaid services. TR1 at 56. Prior to entering into the contract, S&S did not inform Peterson that S&S was experiencing any financial problems. TR1 at 56-57. Dakota Premium Hay's telephone lines were never switched over to S&S and Dakota Premium Hay never received any services from S&S. TR1 at 57.

8. Chris Nelson, the manager of Pharmco Industries, stated that Pharmco Industries entered into a contract with S&S for telephone services on January 6, 2003. TR1 at 81; Exhibit 10. Pharmco Industries prepaid \$8,219.00 for four years of telephone service. TR1 at 81-82; Exhibit 10A. Pharmco Industries began to receive service in February of 2003. TR1 at 84. Pharmco Industries' telephone service with S&S was shut off on June 3, 2003. TR1 at 101. Pharmco Industries lost two days of sales activity before it could be connected with another telephone service provider. TR1 at 84-85.

9. David Moodie, vice-president of Moodie Implement, stated that Moodie Implement entered into a contract with S&S for telephone services on November 6, 2002. TR1 at 105; Exhibit 8. Moodie Implement prepaid \$14,562.28 for four years of service. TR1 at 107; Exhibit 8. Moodie was also given a document entitled "Notice to Customers." Exhibit 8, page 3. The notice was signed by Les Sumption, with his title listed as President of S&S, and Tim Rich, with his title listed as Vice President of Aberdeen Finance Corporation. The notice stated, in part, as follows:

In the unlikely event that S & S Communications is unable to provide the long distance service to its customers, S & S Communications and Aberdeen Finance Corporation wish to inform you that any remaining monies owed under your Aberdeen Finance Corporation contract would be the responsibility of S & S Communications. Aberdeen Finance Corporation will look to the collateral provided them by S & S Communications to repay and resolve the balance.

Prepaid customers who did not finance their contract would be refunded by a state registered bonding company for the prorated amount of the service that the customer did not receive.

This letter does not alter any terms under your existing contract with S & S Communications or Aberdeen Finance Corporation, it merely clarifies S & S Communications obligations in [sic] unlikely event S & S Communications stops providing long distance services.

Both S & S Communications and Aberdeen Finance Corporation hope that this added security feature to our program will insure a strong healthy customer relationship for many years to come.

Moodie stated that this notice was an important consideration in the company's decision to enter into a prepaid contract with S&S. TR1 at 108-09. He believed that the company's prepayment of the money was without any risk to the company. TR1 at 108.

10. Moodie Implement began to lose service at the end of May and early June. TR1 at 112-13. It took longer to switch the company's 800 numbers to another provider than the other telephone numbers. TR1 at 113. Moodie Implement has not been refunded any of the money it paid to S&S. TR1 at 114.

11. Robert Angerhofer, the director of travel for AAA of South Dakota, stated that AAA entered into a contract for telephone services with S&S on July 12, 2002. TR1 at 123, 148-49. AAA of South Dakota prepaid \$35,100.84 for four years. TR1 at 148. AAA of South Dakota has 15 offices throughout the state. TR1 at 123. By the first part of August, S&S was providing telephone services to all of the 15 offices, with approximately 240 telephone lines. TR1 at 149, 153-54. On June 3, 2003, telephone services provided by S&S ended. *Id.* Some of the offices were without telephone

services for ten days. TR1 at 150-51. AAA of South Dakota's telephone service is a critical component of its business and 80 to 90 percent of its business is conducted over the telephone. TR1 at 124, 151. AAA of South Dakota has not been refunded any of the money it paid to S&S. TR1 at 151.

12. Angerhofer was given a copy of the Notice to Customers referenced in finding of fact 9. TR1 at 156; Exhibit 12. He stated that if he knew that S&S did not have dollar for dollar bonding, he would have had concerns about entering into the contract. TR1 at 156.

13. [CONFIDENTIAL FINDING OMITTED]

14. Wendy Fransen, vice president of finance and corporate secretary/treasurer for Benchmark Foam, Incorporated, stated that Benchmark Foam entered into a contract with S&S for telephone services on September 10, 2002. TR1 at 171; Exhibit 14. Benchmark Foam entered into a four year contract for \$8,712.00. TR1 at 172. Benchmark Foam began to receive some of its telephone services in October of 2002. TR1 at 172. Telephone services from S&S ended on June 2, 2003. TR1 at 173. Benchmark Foam has not been refunded any of the money it prepaid. TR1 at 174.

15. At Fransen's request, she was shown a financial statement. TR1 at 160-61. Fransen would not have entered into the agreement with S&S if S&S had not shown her the financial statement. TR1 at 160-61, 176-77. [CONFIDENTIAL PORTION OMITTED]

16. Keith Willard, president and CEO of 1st Financial Bank USA, Dupree, South Dakota, stated that 1st Financial Bank entered into a contract for three years of service for \$20,412.00. TR1 at 191; Exhibit 15. The bank switched to another carrier when it learned that S&S was going to stop providing services in the first part of June of 2003. TR1 at 191.

17. Willard requested a financial statement and was shown, but not given a copy, of one. TR1 at 182. Willard stated that he would not have entered into a contract if he had not been shown a financial statement. TR1 at 194. [CONFIDENTIAL PORTION OMITTED]

18. Troy Clavel, vice president of 1st Financial Bank, Sioux Falls, South Dakota, stated that 1st Financial Bank entered into a contract with S&S for telecommunications services on September 30, 2002. TR1 at 199, 205; Exhibit 16. The bank paid \$156,600.00 for an 18 month contract for three long distance T1s. TR1 at 203, 206. The bank did not receive any services as specified in the contract. TR1 at 206.

19. Keith Senger, a utility analyst employed by the Commission, stated that he was assigned to process S&S' application for a certificate of authority which was filed in July of 2000. TR2 at 25; Exhibit S1. Senger stated that, based on information provided to him by S&S, S&S is a partnership owned and operated by Les Sumption and Matt Swearingen. *Id.* S&S provides wireless cellular telecommunications services and wireline long distance services. TR2 at 25-26.

20. S&S began providing prepaid long distance telecommunications services prior to obtaining a certificate of authority. TR2 at 38. Some of the prepaid services were financed by Aberdeen Finance Corporation. TR2 at 47. Based on the large amount of money for prepaid services that S&S had not yet provided to its current customers at the time of S&S' application for a certificate of authority was pending, Commission Staff requested that S&S provide a bond in the amount of 100% of the unearned revenue in order to receive a certificate of authority. TR2 at 41. Commission Staff received a bond for \$50,000.00, which was issued on September 6, 2000 by Nationwide Mutual

Insurance Company. TR2 at 42; Exhibit S4, page 3. The next year a new bond was issued with the amount increased to \$75,000.00 and an effective date of June 20, 2001. Exhibit S7, pages 12-13.

21. In addition to the bond, S&S also provided a letter from Aberdeen Finance Corporation, dated December 8, 2000, and signed by Tim Rich, vice president of Aberdeen Finance Corporation. TR2 at 45; Exhibit S6. The letter was addressed to Senger and stated:

This letter is to confirm the agreement between S&S Communications and the Aberdeen Finance Corporation concerning the treatment of prepaid customers of S&S. In connection with addressing issues raised by you in connection with S&S's application to the South Dakota PUC, S&S obtained professional appraisals of its wireless system assets, including numerous [sic] wireless licenses, which it has offered to provide as collateral to the Aberdeen Finance Corporation. The amount of collateral S&S will be providing to the Aberdeen Finance Corporation has an estimated market value in excess of \$2.5 million. In exchange, the Aberdeen Finance Corporation has agreed that in the event of a default by S&S of its contractual obligations to provide long distance service to S&S's prepaid customers, the Aberdeen Finance Corporation will look to this collateral and to individual guaranties, and not to customers for whom it holds financing agreements. This agreement would not in any way relieve S&S's customers from paying for services they receive from S&S or otherwise affect their obligations to the Aberdeen Finance Corporation under their financing agreements with us. The approximate amount of finance contracts currently held by the Aberdeen Finance Corporation for S&S customers is [sic] \$603,000.

This document is referred to as the collateral agreement. TR2 at 45.

22. S&S' application for a certificate of authority was approved by the Commission by order dated December 21, 2000. Exhibit 1. As stated in finding of fact 2, one of the conditions of its certification required S&S and Aberdeen Finance Corporation to send a letter to all of S&S' long distance customers for which AFC holds financing agreements informing them of the collateral agreement. *Id.* The second condition required S&S to maintain a continuous \$50,000 (at a minimum) surety bond. *Id.* The third condition required S&S to report to the Commission the current level of prepaid customers and update its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement. *Id.* Thus, under condition three, the amount financed by Aberdeen Finance Corporation directly reduced the amount of the bond on a dollar for dollar basis.

23. On June 22, 2001, Commission staff received S&S' compliance filing which had been due on June 21, 2001. TR2 at 48; Exhibit S7. The compliance filing included a customer list and a calculation of the unearned revenue. *Id.* It also included a letter from Aberdeen Finance Corporation indicating the amount of principal balance that Aberdeen Finance Corporation was holding in loans for S&S' customers. *Id.*

24. On September 27, 2001, Commission Staff received a Notice of Bond Cancellation from Nationwide Mutual Insurance Company which stated the bond would be cancelled on October 30, 2001. TR2 at 49; Exhibit S8a. The Notice of Bond Cancellation stated that the bond was being canceled for failure to submit underwriting requirements. *Id.* A new bond was sent to the Commission Staff on November 13, 2001. TR2 at 53; Exhibit S8d. The bond was for \$75,000.00, with an effective date of October 30, 2001, and was issued by Star Insurance Company. *Id.*

25. S&S never submitted its December 21, 2001 compliance filing TR2 at 55. Senger contacted Les Sumption and told him that S&S needed to send the compliance filing but it was never filed. TR2 at 56.

26. On July 22, 2002, Commission Staff received S&S' compliance filing that had been due on June 21, 2002. TR2 at 55; Exhibit S9a. Following this filing, Commission Staff issued a series of data requests regarding S&S' compliance filing. TR2 at 60-61; Exhibits S10a, S10b, S10c, S10d. S&S did not answer all of the data requests. TR2 at 61-63; Exhibits S11a, S11b, S11c. Due to S&S' failure to answer all of the data requests, Senger informed S&S that Staff would file a motion for an Order to Show Cause with the Commission. TR2 at 62-63. The motion was filed. TR2 at 63. [CONFIDENTIAL PORTION OMITTED]

27. On September 12, 2002, Commission Staff received a copy of an irrevocable standby letter of credit issued by Aberdeen Finance Corporation for S&S. TR2 at 62; Exhibit S12. The irrevocable letter of credit listed the Commission as the beneficiary with an effective date of September 12, 2002. *Id.* The letter of credit was for an amount not to exceed \$125,000.00 and was payable upon receipt by Aberdeen Finance Corporation of an affidavit executed by the Commission certifying that claims had been presented by South Dakota consumers against S&S for not providing long distance services. *Id.*

28. On November 4, 2002, S&S submitted a revised customer list and additional information that had been requested by Commission Staff regarding the July 22, 2002 filing (which had been due on June 21, 2002). TR2 at 63-64; Exhibit S13. Commission Staff then prepared an exhibit based on the information supplied by S&S which showed Staff's bond calculation and sent it to S&S. TR2 at 65; Exhibit S14.

29. S&S missed the deadline for its December 21, 2002 filing. TR2 at 70-71. After repeated requests for the filing, S&S sent some information on January 22, 2003. TR2 at 71; Exhibits S16a, S16b, pages 2 and 3, S16c, S17. After Commission Staff made repeated requests for the complete filing, S&S filed additional information on February 3, 2003. TR2 at 71-73; Exhibits S18a, S18b, S19. Following submission of this material, S&S admitted in a telephone conversation that it was under-bonded. TR2 at 74.

#### **CONFIDENTIAL FINDINGS - FINDINGS 30 through 47**

[CONFIDENTIAL FINDINGS 30 THROUGH 47 OMITTED]

#### **REVOCAION OF CERTIFICATE OF AUTHORITY**

48. The Commission finds good cause exists to revoke S&S' certificate of authority. Based on the preceding findings of fact, the Commission finds S&S has willfully failed to comply with Commission rules, orders, and state law. In addition, the Commission finds that S&S has failed to maintain accounts and records as required by the Commission; failed to file with the Commission all financial and other reports that the Commission may require, in a form and at such times as the Commission may designate; failed to cooperate with Commission investigations or inquiries regarding customer complaints; and furnished and made misleading and false statements and reports, by an officer or agent of a telecommunications company, to the Commission. See Findings of Fact 6, 7, 20 through 47. The Commission notes that S&S had no objection to the Commission revoking S&S' certificate of authority. TR1 at 13.



## CIVIL FINES

49. The Commission's March 20, 2003 order amended S&S' certificate of authority by restricting S&S from offering prepaid services unless given prior approval of the Commission. Exhibit 2. Based on finding of fact 6, the Commission finds that S&S violated the Commission's March 20, 2003, order by selling prepaid services to Legend Seeds Incorporated on April 17, 2003. Pursuant to SDCL 49-31-38, the Commission assesses a fine of \$1,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violation of the Commission's March 20, 2003 order. The Commission notes that S&S agreed to the restriction from offering prepaid services. Notwithstanding that agreement and the Commission's order, less than one month later, S&S sold a prepaid contract worth \$11,700.28 to Legend Seeds.

50. Based on finding of fact 7, the Commission finds that S&S violated the Commission's March 20, 2003 order by selling prepaid services to Dakota Premium Hay on April 29, 2003. Pursuant to SDCL 49-31-38, the Commission assesses a fine of \$1,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violation of the Commission's March 20, 2003 order. Even though S&S was explicitly prohibited from selling prepaid services, S&S entered into a contract with Dakota Premium Hay and Dakota Premium Hay prepaid \$3,360.00 for six years and did not receive even a day's worth of service from S&S.

51. As a condition of receiving a certificate of authority from the Commission to provide telecommunications services in South Dakota, S&S was required to report to the Commission the current level of prepaid customers and update its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement. See Exhibit 1. Pursuant to SDCL 49-31-38, the Commission finds S&S violated the Commission's Order granting S&S a certificate of authority by failing to provide 100% bond coverage at the time S&S received its certificate of authority in December of 2000. See Findings of Fact 31 through 35. In addition, the Commission finds that S&S failed to provide 100% bond coverage at each six month interval following the issuance of S&S' certificate of authority. S&S failed to provide 100% bond coverage by June 21, 2001, December 21, 2001, June 21, 2002, December 21, 2002, and June 21, 2003. TR2(conf.) at 145-157; See Findings of Fact 31-46. The Commission assesses a fine of \$1,000.00 for each time S&S failed to provide 100% bond coverage for a total fine of \$6,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violations of the Commission's December 21, 2000, order granting S&S its certificate of authority and the Commission's June 3, 2003 order amending S&S' certificate of authority.

52. As a condition of receiving a certificate of authority from the Commission to provide telecommunications services in South Dakota, S&S was required to report to the Commission the current level of prepaid customers. See Exhibit 1. The Commission finds S&S filed incomplete, misleading, and inaccurate information with the Commission during the time its application for a certificate of authority was pending before the Commission. See Findings of Fact 31 through 35. Pursuant to SDCL 49-31-38, the Commission finds this violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violation of the Commission's December 21, 2000, order granting S&S its certificate of authority. [CONFIDENTIAL PORTION OMITTED]

53. The Commission further finds S&S filed incomplete, misleading, and inaccurate information with the Commission regarding its required June 21, 2002 filing. See Findings of Fact 36 through 42. Pursuant to SDCL 49-31-38, the Commission finds this violated the Commission's order granting

S&S its certificate of authority and assesses a fine of \$1,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violation of the Commission's December 21, 2000, order granting S&S its certificate of authority. [CONFIDENTIAL PORTION OMITTED]

54. The Commission further finds S&S filed incomplete, misleading, and inaccurate information with the Commission regarding its required December 21, 2002 filing. See Finding of Fact 43. Pursuant to SDCL 49-31-38, the Commission finds this violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00. The Commission assesses the maximum amount allowed under the statute due to the clear and blatant violation of the Commission's December 21, 2000, order granting S&S its certificate of authority. [CONFIDENTIAL PORTION OMITTED]

55. The Commission finds S&S violated SDCL 49-31-7.4 by failing to provide information to the Commission. See Findings of Fact 26, 46, 47. The Commission finds S&S obstructed the Commission by refusing to give information that was within its possession and failed to produce records or evidence "that may be required by the commission or member within the purview of its or his duties as such commission or member." SDCL 49-31-7.4. The Commission assesses the maximum fine of \$1,000.00 based on S&S' repeated failures to provide the requested information.

56. S&S was required to report to the Commission the current level of prepaid customers and update its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement. See Exhibit 1. S&S failed to make the required filing for December 21, 2001. See Finding of Fact 25. Pursuant to SDCL 49-31-38, the Commission finds this failure violated the Commission's December 21, 2000 order granting S&S its certificate of authority and assesses a fine of \$1,000.00. The Commission assesses the maximum fine of \$1,000.00 based on the fact that S&S failed to file *any* information as required.

57. S&S filed its June 21, 2002 required filing one month late. See Finding of Fact 26. Pursuant to SDCL 49-31-38, the Commission finds this late filing violated the Commission's December 21, 2000 order granting S&S a certificate of authority and assesses a fine of \$200.00. The Commission finds a fine is appropriate in this circumstance due to the fact that S&S had already failed to file in December and then failed to file this June 21, 2002 required filing in a timely manner.

58. S&S filed its December 21, 2002 required filing on February 3, 2003. See Finding of Fact 29. Pursuant to SDCL 49-31-38, the Commission finds this late filing violated the Commission's December 21, 2000 order granting S&S a certificate of authority and assesses a fine of \$200.00. The Commission finds a fine is appropriate in this circumstance due to the fact that S&S had already failed to file, or filed late, in the previous two required filings and then failed to file this December 21, 2002 required filing in a timely manner.

#### ORDER TO COMPEL

59. At this time, the Commission finds that it will not issue any orders to compel.

#### RELEASE OF 800 NUMBERS

60. The Commission orders S&S to release any 800 numbers upon the request of an S&S customer. S&S did not contest this requirement. TR1 at 14.

## BONDS AND LETTER OF CREDIT

61. The Commission finds that it will take any action necessary to obtain the proceeds of any bonds and the letter of credit issued by Aberdeen Finance Corporation. S&S did not contest this action. TR1 at 14-15.

### BAN ON REAPPLYING FOR CERTIFICATE OF AUTHORITY

62. Based on preceding findings of fact, the Commission finds that the owners of S&S, Les Sumption and Matt Swearingen, may not reapply for a certificate of authority during their lifetimes, unless otherwise ordered by the Commission. From the time S&S applied for a certificate of authority through the present, Sumption and Swearingen have provided incomplete, misleading, and inaccurate information to the Commission. See Findings of Fact 30 through 47. In addition, Sumption and Swearingen have often failed to provide any information, or provided it late, when requested by Commission staff or when the information was required by Commission order. See Findings of Fact 25, 26, 28, 29, 46, 47. The facts demonstrate that Sumption and Swearingen provided incomplete, misleading, and inaccurate information in order to *obtain* a certificate of authority from this Commission and then continued to provide incomplete, misleading, and inaccurate information in order to *retain* its certificate of authority. See Findings of Fact 31 through 46. Further, Sumption and Swearingen, as owners and operators of S&S, violated Commission orders and provided misleading and inaccurate information to potential customers. See Findings of Fact 6 through 47.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 49-13 and 49-31, specifically 49-13-4, 49-13-5, 49-13-13, 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.4, 49-31-11, 49-31-38, and 49-31-38.1, and ARSD 20:10:01:28, 20:10:01:45, 20:10:24:02, 20:10:24:03, 20:10:24:04, 20:10:24:04.02, 20:10:24:04.03, and 20:10:24:04.04.

2. Pursuant to SDCL 49-31-3, "[t]he commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies." In order for a telecommunications company to provide services in South Dakota the company must have a certificate of authority. SDCL 49-31-3. Once a certificate of authority is granted by the Commission, the certificate may be suspended or revoked "for a willful violation of the laws of this state, a willful failure to comply with a rule or order of the commission, or other good cause." *Id.*

3. Pursuant to ARSD 20:10:24:04.02, the Commission may revoke or suspend a certificate of authority for the following reasons:

Failure of any provider of interexchange service to comply with applicable requirements set forth in this chapter, other terms and conditions imposed on its certification by the commission, or applicable rules and laws, or for other good cause may result in the suspension or revocation of the provider's certificate of authority to provide interexchange services. Other good cause may include the following conduct:

- (1) Failure to maintain accounts and records as required by the commission;
- (2) Failure to file with the commission all financial and other reports that the commission may require, in a form and at such times as the commission may designate;
- (3) Failure to maintain on file with the commission all current tariffs and rates;
- (4) Failure to cooperate with commission investigations or inquiries regarding customer complaints; and
- (5) The furnishing or making of any misleading or false statement or report by an officer or agent of a telecommunications company, including those made by its legal counsel, to the commission.

4. As stated in finding of fact 48, the Commission finds good cause exists to revoke S&S' certificate of authority. The Commission finds S&S has willfully failed to comply with Commission rules, orders, and state law. In addition, the Commission finds that S&S has failed to maintain accounts and records as required by the Commission; failed to file with the Commission all financial and other reports that the commission may require, in a form and at such times as the Commission may designate; failed to cooperate with Commission investigations or inquiries regarding customer complaints; and furnished and made misleading and false statements and reports, by an officer or agent of a telecommunications company, to the Commission. See Findings of Fact 6, 7, 20 through 47.

5. SDCL 49-31-38 provides as follows:

Any person who violates, neglects, fails or refuses to comply with any of the provisions of chapters 49-30 to 49-32, inclusive, not otherwise specifically penalized in those chapters, or who violates, neglects, fails or refuses to comply with any lawful order, rule or regulation of the commission in connection with the regulation of telecommunications companies, is punishable by a civil fine of not less than two hundred nor more than one thousand dollars."

6. Pursuant to SDCL 49-31-38, the Commission assesses the following civil fines against S&S, and its owners, Matt Swearingen, and Les Sumption:

- a. Based on findings of fact 6 and 49, the Commission finds that S&S violated the Commission's March 20, 2003, order by selling prepaid services to Legend Seeds Incorporated on April 17, 2003 and the Commission assesses a fine of \$1,000.00;
- b. Based on findings of fact 7 and 50, the Commission finds that S&S violated the Commission's March 20, 2003 order by selling prepaid services to Dakota Premium Hay on April 29, 2003 and the Commission assesses a fine of \$1,000.00;
- c. Based on findings of fact 31 through 46, inclusive, and 51, the Commission finds S&S violated the Commission's Order granting S&S a certificate of authority and its June 3, 2003 order amending S&S' certificate of authority by failing to provide 100% bond coverage in December of 2000, June 21, 2001, December 21, 2001, June 21, 2002, December 21, 2002, and June 21, 2003. The Commission assesses a fine of \$1,000.00 for each time S&S failed to provide 100% bond coverage for a total fine of \$6,000.00;

d. Based on findings of fact 31 through 35, inclusive, and 52, the Commission finds S&S filed incomplete, misleading, and inaccurate information with the Commission during the time its application for a certificate of authority was pending before the Commission. The Commission finds this violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00;

e. Based on findings of fact 36 through 42, inclusive, and 53, the Commission finds S&S filed incomplete, misleading, and inaccurate information with the Commission regarding its required June 21, 2002 filing. The Commission finds this violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00;

f. Based on findings of fact 43 and 54, the Commission finds S&S filed incomplete, misleading, and inaccurate information with the Commission regarding its required December 21, 2002 filing. The Commission finds this violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00;

g. Based on findings of fact 25 and 56, the Commission finds S&S failed to file the required filing for December 21, 2001. The Commission finds this failure violated the Commission's order granting S&S its certificate of authority and assesses a fine of \$1,000.00;

h. Based on findings of fact 26 and 57, the Commission finds S&S filed its June 21, 2002 required filing one month late. The Commission finds this late filing violated the Commission's order granting S&S a certificate of authority and assesses a fine of \$200.00; and

i. Based on findings of fact 29 and 58, the Commission finds S&S filed its December 21, 2002 required filing on February 3, 2003. The Commission finds this late filing violated the Commission's order granting S&S a certificate of authority and assesses a fine of \$200.00.

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7. SDCL 49-31-7.4 provides as follows:

No person may obstruct the commission or any member thereof in the performance of any of its duties or functions or refuse to give any information within its possession or to produce any record or evidence that may be required by the commission or member within the purview of its or his duties as such commission or member. Any person who violates this section may be punished by a civil fine not exceeding one thousand dollars.

8. Pursuant to SDCL 49-31-7.4, the Commission assesses a \$1000.00 civil fine against S&S, and its owners, Matt Swearingen, and Les Sumption. Based on findings of fact 26, 46, 47, and 55, the Commission finds S&S and its owners violated SDCL 49-31-7.4 by repeatedly failing to provide information to the Commission. S&S and its owners obstructed the Commission by refusing to give information that was within its possession and failed to produce records or evidence "that may be required by the commission or member within the purview of its or his duties as such commission or member." SDCL 49-31-7.4.

9. The Commission orders S&S to release any 800 numbers upon the request of an S&S customer.

10. The Commission finds that it will take any action necessary to obtain the proceeds of any bonds and the letter of credit issued by Aberdeen Finance Corporation.

11. Pursuant to ARSD 20:10:24:04.04, if the Commission revokes a certificate of authority, the Commission may bar the holder of the certificate of authority from reapplying "for a certificate of authority for at least one year after the date of revocation, unless the commission determines that other action is more appropriate."

12. As stated in finding of fact 62, the Commission finds that the owners of S&S, Les Sumption and Matt Swearingen, may not reapply for a certificate of authority during their lifetimes, unless otherwise ordered by the Commission. From the time S&S applied for a certificate of authority through the present, Sumption and Swearingen have provided incomplete, misleading, and inaccurate information to the Commission. See Findings of Fact 30 through 47. In addition, Sumption and Swearingen have often failed to provide any information, or provided it late, when requested by Commission staff or when the information was required by Commission order. See Findings of Fact 25, 26, 28, 29, 46, and 47. The facts demonstrate that Sumption and Swearingen provided incomplete, misleading, and inaccurate information in order to *obtain* a certificate of authority from this Commission and then continued to provide incomplete, misleading, and inaccurate information in order to *retain* its certificate of authority. See Findings of Fact 31 through 46. Further, Sumption and Swearingen, as owners and operators of S&S, violated Commission orders and provided misleading and inaccurate information to potential customers. See Findings of Fact 6 through 47.

It is therefore

ORDERED, that S&S' certificate of authority is revoked; and it is

FURTHER ORDERED, that S&S and its owners, Sumption and Swearingen, are assessed a civil fine of \$13,400.00; and it is

FURTHER ORDERED, that S&S will release any 800 numbers upon the request of an S&S customer; and it is

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FURTHER ORDERED, that the Commission it will take any action necessary to obtain the proceeds of any bonds and the letter of credit issued by Aberdeen Finance Corporation; and it is

FURTHER ORDERED, that the owners of S&S, Les Sumption and Matt Swearingen, may not reapply for a certificate of authority during their lifetimes, unless otherwise ordered by the Commission.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 28<sup>th</sup> day of August, 2003. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 28<sup>th</sup> day of August, 2003.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: *Alaine Kalbo*

Date: 8/29/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

*Robert K. Sahr*  
ROBERT K. SAHR, Chairman

*Gary Hanson*  
GARY HANSON, Commissioner

*James A. Burg*  
JAMES A. BURG, Commissioner

